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SERVICE DATE – FEBRUARY 5, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32760 (Sub-No. 35)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND  
MISSOURI PACIFIC RAILROAD COMPANY  
— CONTROL AND MERGER —  
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION  
COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND  
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

Decided: January 28, 2002

We are denying an appeal from an arbitration panel's decision finding that Kathleen Sullivan (Claimant) had voluntarily accepted a severance package and waived any potential claim to labor protection benefits.

BACKGROUND

In our decision in Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996), we approved the acquisition and control of the Southern Pacific Transportation Company (SP) by the rail carriers controlled by the Union Pacific Corporation, including the Union Pacific Railroad Company (UP or the carrier), subject to the standard New York Dock conditions for the protection of affected employees.<sup>1</sup> Under those conditions, employees who are adversely affected by labor changes related to approved transactions are entitled to receive comprehensive displacement and dismissal benefits for up to 6 years. Under Article IV of the New York Dock conditions, adversely affected non-managerial employees who are not represented by a labor organization "shall be afforded substantially the same levels of protection as are afforded to members of labor organizations." If there is disagreement over an application of, or eligibility under, the New York Dock conditions, the dispute may be taken to arbitration pursuant to

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<sup>1</sup> See New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

Article I, section 11 of the New York Dock conditions, 360 I.C.C. at 87, subject to appeal to the Board under our deferential Lace Curtain standards of review.<sup>2</sup>

Ms. Sullivan had been employed by SP since June 1984, first as a legal secretary and subsequently as an administrative assistant in the railroad's department of marketing services. In this position, which was not represented by a labor organization, Claimant reported directly to the director of marketing systems support, and received an annual salary of \$38,000. Prior to her employment with SP, Claimant worked for the Western Pacific Railroad (WP) as a clerk stenographer from 1963 to 1983. When UP acquired WP, her unionized position was abolished, and she received employee protective benefits pursuant to the New York Dock conditions imposed on the UP/WP transaction.

On October 11, 1995, SP notified Claimant that her administrative assistant position would be eliminated, effective November 30, 1995.<sup>3</sup> According to Claimant, SP's vice president of human resources told her in mid-November 1995 that the position was being eliminated as part of a downsizing program due to financial difficulties, not as a consequence of the yet-to-be approved acquisition by UP.<sup>4</sup> On November 30, 1995, SP abolished Claimant's position and offered her a severance package under its non-union severance benefit plan.

The severance plan provided for a lump sum payment of \$8,123.08 as consideration for Claimant's release of SP from any claims arising from the termination of her employment.<sup>5</sup>

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<sup>2</sup> The standards for the Board's review are set forth in Chicago & North Western Tptn. Co. — Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom. IBEW v. ICC, 826 F.2d 330 (D.C. Cir. 1988), known as the "Lace Curtain" case. 49 CFR 1115.8. Under the Lace Curtain standards, the Board does not review issues of causation, the calculation of benefits, or the resolution of other factual questions in the absence of egregious error. 3 I.C.C.2d at 735-36.

<sup>3</sup> Prior to this notification, on August 3, 1995, SP's board of directors announced its approval of the agreement for SP to be acquired by the UP. UP and SP filed their merger application on November 30, 1995, and that application was approved by the Board by decision served on August 12, 1996.

<sup>4</sup> SP had begun to reduce its forces in 1991, and the number of jobs on the railroad had already decreased by some 5,000 positions, from 23,000 in 1991, to 18,000 in 1994. In August 1993, May 1994, and June 1994, Claimant sent letters to her supervisors asking them to keep her employed.

<sup>5</sup> The release specified:

(continued...)

Claimant signed the application for severance benefits on February 13, 1996, and an SP official executed the severance agreement on February 16, 1996.<sup>6</sup>

On August 28, 1997, Claimant requested compensation under the New York Dock conditions for her dismissal. After UP rejected her claim, she took the matter to arbitration. UP argued that she freely waived any right to possible benefits under the New York Dock conditions when she accepted the lump sum payment and signed the release. Claimant argued that the agreement was invalid because her consent to the waiver was induced by misrepresentation, lack of knowledge of her rights, and economic distress. In reply, UP denied misrepresentation. It also maintained that Claimant had ample time to weigh her options, including the opportunity to obtain counsel, and, in light of the fact she had previously received employee protective benefits, she knew what was involved in waiving any claim to benefits. UP also responded that Claimant would have been ineligible for benefits under the New York Dock conditions, even if she had not accepted the severance package, for two reasons: first, because her discharge was not caused by the merger; and second, because she was a managerial employee. Claimant maintained that she was not a managerial employee and that the UP/SP merger was in fact the cause of her discharge.

In an award issued on September 17, 1999, by neutral member John B. LaRocco (the Award), the arbitration panel denied Claimant's request for benefits under the New York Dock conditions. The panel rejected Claimant's argument that the waiver was invalid, finding that (1) Claimant had not shown that UP had "intentionally misrepresented a material fact" to induce her to sign the release and (2) "the evidence does not show that Claimant justifiably relied on the representations made by UP officials." Award, at p. 19. The panel did not determine whether Claimant would have otherwise been eligible for New York Dock benefits because the panel concluded that Claimant had voluntarily waived her rights to any such benefits when she accepted the severance package.

On January 5, 2000, Claimant filed an appeal of the LaRocco Award. UP filed a reply in opposition to the appeal on January 24, 2000.

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<sup>5</sup>(...continued)

In consideration of the separation allowance that I will receive, ... I release and discharge [SP] from any and all [claims] ... arising from my ... separation from employment ....

<sup>6</sup> Claimant's evidence on appeal indicates that she initially (but unsuccessfully) attempted to add a proviso to the agreement that would have specified that she accepted the settlement "provided that my severance package is no less than it would have been had it been calculated using the formula applicable to other similar Management personnel that lose their positions during the first year after the merger with Union Pacific becomes effective."

## DISCUSSION AND CONCLUSIONS

Pursuant to Lace Curtain, we generally limit our review of arbitral awards to recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions. 3 I.C.C.2d. at 736. Moreover, we do not review factual determinations in the absence of “egregious error.” Id. at 735-36. Claimant argues that the panel’s failure to find that the carrier committed fraud, or that she was under undue pressure when she signed the settlement agreement, constitutes egregious error. Claimant also argues that the panel should have decided whether she would have been eligible for employee protective conditions had she not agreed to the severance package. Because we find no egregious error in the panel’s decision, we decline to review this award.

The panel first found that Claimant’s waiver of any potential employee protection was broad and unequivocal and, thus, if the release was enforceable, her claim was barred.<sup>7</sup> After analyzing Ms. Sullivan’s allegations of fraud and duress, the panel concluded that Claimant had not established that any communication from the carrier was demonstrably false or misleading. Rather, the panel concluded that SP officials merely expressed their opinion that Ms. Sullivan probably was not eligible for New York Dock benefits in light of her managerial position and because her discharge was due to general business conditions rather than the UP/SP consolidation. The panel also concluded that SP had not exerted undue pressure on Claimant to induce her to sign the agreement.

Claimant’s challenge to the panel’s findings falls far short of showing egregious error. What Ms. Sullivan was told regarding her eligibility for New York Dock benefits is undisputed, and the panel’s determination that the representations made by SP officials did not constitute intentional misrepresentation is well-supported.<sup>8</sup> The panel analyzed the misrepresentation allegations under the correct standard,<sup>9</sup> and justifiably concluded that Claimant had not made her case. The panel specifically noted that reasonable persons could differ over whether Claimant would have been eligible for New York Dock benefits if she had not signed the severance

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<sup>7</sup> It is not disputed that the terms of the severance agreement embraced a waiver of potential New York Dock benefits.

<sup>8</sup> Indeed the panel opined that “[I]t may be that the HR Vice President was correct when she said that Claimant was not eligible for New York Dock benefits.” Award, at 19 n.11.

<sup>9</sup> See Great Northern Pac.–Merger–Great Northern Ry.–in the Matter of William A. Rilling, 8 I.C.C.2d 229, 241 (1991), aff’d sub nom. Rilling v. Burlington Northern R. Co., 31 F.3d 855, 859 (1994) (“[T]he standard ‘for analyzing allegations of misrepresentation, such as here, is whether there has been a showing of an affirmative misrepresentation of a material element, followed by detrimental reliance by the employee.’”).

agreement waiver, and found that Claimant had failed to show that carrier officials had intentionally misled her when they discussed the issue of her eligibility with her. As the panel noted, SP officials did not unequivocally state that Claimant would not be eligible for benefits.<sup>10</sup> Rather, they expressed their opinion, based on their knowledge of her managerial responsibilities as well as SP's previous downsizing efforts, that she was probably not entitled to labor protection as a matter of right. Finally, the panel noted that Ms. Sullivan was encouraged to seek legal advice, and she was given ample time to do so and to consider her course of action.

Claimant acknowledges that she was afforded more than 2 months to decide whether to sign the agreement and that she consulted with several attorneys during that time.<sup>11</sup> The panel reasonably found that Claimant, after receiving advice from attorneys, made a calculated decision to sign the waiver and to collect the severance payment rather than to bear the risks of litigation. Thus, the panel's conclusion that the carrier did not commit fraud or unduly pressure Ms. Sullivan to waive her potential employee protection clearly did not constitute egregious error, if it was error at all.

Furthermore, contrary to Ms. Sullivan's arguments, it was entirely reasonable for the panel to suggest that her prior experience in receiving New York Dock benefits should have put her on notice that these benefits might be available to her again and that she should refrain from signing a severance agreement without first weighing all her options.<sup>12</sup> Indeed, Claimant's entire case is premised on allegedly fraudulent statements by SP officials that were made in response to inquiries from her about her eligibility for New York Dock benefits.

Finally, it was not incumbent upon the panel, as Ms. Sullivan suggests, to determine whether she would have been eligible for benefits absent the waiver. The panel correctly

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<sup>10</sup> According to petitioner's own pleading, SP's Vice President-Human Resources, in response to Claimant's enquiry about possible New York Dock benefits, had told her that "as far as she knew [Sullivan] was not covered." (Emphasis added). Petition, at page 6.

<sup>11</sup> Claimant specifies in her submission to the Board that she "contacted [four] qualified labor attorneys" before signing her severance. According to Claimant, at least one of these attorneys was familiar with proceedings involving New York Dock matters.

<sup>12</sup> As the panel stated (Award, at 19-20):

Claimant had experience with New York Dock protective conditions. If, as she asserts, she was performing exactly the sort of clerical duties that she had performed on the former Western Pacific, Claimant should have known that she might be covered by New York Dock Conditions and thus, she should have refrained from signing the release.

presumed that, in the absence of fraud by the carrier, Claimant could lawfully waive her rights to New York Dock benefits without knowing what those rights, if any, were.

In this regard, the instant case is reminiscent of a decision reached by our predecessor agency, the Interstate Commerce Commission (ICC or Commission), in Burlington Northern, Inc. and Burlington Northern Railroad Company — Control and Merger — Santa Fe Southern Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549 (Sub-No. 19) (ICC served Dec. 20, 1995) (BNSF). There, employees who had invoked the arbitration process to resolve the question of whether they were covered by the New York Dock conditions filed a petition for a declaratory order asking the ICC to clarify whether they could be required to waive their potential labor protection benefits in advance by accepting a severance package. The Commission declined to declare that accepting a severance package offered by the carrier would entail an invalid waiver of rights under the New York Dock conditions. The ICC stated that claimants were required to make their decision based on the circumstances as they were, and declined to declare in advance that such a waiver would be improper. The Commission specifically noted the risk assumed by employees, because if they accepted severance benefits and the arbitrator were to determine later that employees in similar positions were entitled to higher benefits under the New York Dock conditions, they could not collect the higher benefits. The Commission also noted, conversely, that if the employees did not accept a severance package, and the arbitrator ultimately determined that they were not entitled to New York Dock benefits, they would have forgone any severance pay.

The Commission concluded that a waiver could knowingly be accepted as part of a settlement to avoid the inherent risk of litigation regarding a legitimate dispute as to whether particular employees would be eligible for benefits under the New York Dock conditions. It found that the severance package was essentially a settlement agreement whereby claimants could accept the program benefits in lieu of any benefits they may have been entitled to under the New York Dock conditions. The Commission stated that it had no role in determining how a carrier should structure or condition such settlement offers. Rather, where there was a valid dispute as to coverage, the Commission allowed the parties to negotiate their own settlement agreements.

In the instant case, just as in BNSF, neither side knows with any degree of certainty whether the employee(s) would be entitled to New York Dock benefits or would be entitled to nothing. Here, as there, the carrier offered a settlement agreement in lieu of potential benefits. Like the Commission, we see no reason to interfere with this arrangement. And, since the Commission previously dealt with essentially the same situation as is involved here, the instant proceeding raises no significant unresolved issue that would warrant our review.

Accordingly, we decline to review the panel's reasonable finding that Claimant lawfully waived any potential rights she may have had to benefits under the New York Dock conditions and that this waiver was not induced by fraud or misrepresentation. The severance package was

a binding agreement, which she voluntarily entered into, and the panel reasonably found that Claimant knowingly did so in order to avoid the risk of litigation and to ensure that she receive some level of compensation. She was offered a settlement option by the carrier, and chose to accept it rather than pursue a questionable claim for potentially more advantageous labor protection conditions. We also find reasonable the panel's conclusion that, under these circumstances, no useful purpose would be served by determining whether Ms. Sullivan would or would not have been entitled to New York Dock benefits absent the settlement agreement. She voluntarily gave up whatever protections, if any, may otherwise have been available to her.

This decision will not affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The appeal is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams  
Secretary